

To: Timothy E. Corrison[TCorrison@connellfoley.com]
Cc: Flanagan, Sarah[Flanagan.Sarah@epa.gov]
From: Fajardo, Juan
Sent: Thur 6/8/2017 4:30:50 PM
Subject: RE: Harrison Supply - Questions re: Cash Out Settlement Offer

Tim,

The Administrative Settlement Agreement and Order on Consent (Agreement) that EPA entered into with Occidental Chemical Corporation (OXY) for Oxy's performance of the operable unit two (OU2) remedial design speaks for itself. Many of your questions would require EPA to offer legal opinion and/or legal interpretation, which the Agency does not provide to potentially responsible parties. That said, the Agreement does include from EPA a "covenant not to sue or to take administrative action against... [Oxy] for Work performed under [the] Settlement Agreement and for recovery of Future Response Costs". Likewise, the Agreement includes a covenant by Oxy "not to sue and...not to assert any claims or causes of action against the United States...with respect to the Work, past response actions, Future Response Costs, or [the] Settlement Agreement". Also included in the Agreement are covenants by Oxy not to assert claims against De Micromis Parties, *De Minimis* Parties, and Ability to Pay Parties.

The Agreement EPA entered into with Oxy for the OU2 remedial design is not the same as the cash out settlement agreement EPA is offering to enter into with the "early" cash out settlers. The nature of the settlements are different as are the authorities under which the settlements are issued, and those differences are captured by the model settlement documents we use. The early cash out settlement agreement is based on the authority of Section 122(h) of CERCLA.

Sincerely,

Juan M. Fajardo

Assistant Regional Counsel

212 637-3132

From: Timothy E. Corrison [mailto:TCorrison@connellfoley.com]
Sent: Wednesday, June 07, 2017 2:06 PM

To: Fajardo, Juan <Fajardo.Juan@epa.gov>
Cc: Timothy E. Corrison <TCorrison@connellfoley.com>
Subject: Harrison Supply - Questions re: Cash Out Settlement Offer

Thank you.

June 6, 2017

VIA EMAIL

Juan M. Fajardo

Assistant Regional Counsel

U.S. Environmental Protection Agency – Region 2

Fajardo.Juan@epa.gov

Re: Offer of Cash Out Settlement

The Diamond Alkali Superfund Site

Lower 8.3 Miles of Lower Passaic River Study Area

Essex and Hudson Counties, New Jersey

Notice of Potential Liability Under 41 USC §9607(a)

Dear Asst. Regional Counsel Fajardo:

We have been asked to seek clarification regarding several issues pertaining to the

proposed settlement with Harrison Supply Company (“Harrison Supply”). Accordingly, please advise as follows:

1. The Administrative Settlement Agreement and Order on Consent for Remedial for Remedial Design with Occidental Chemical Corporation (“Occidental Settlement Agreement”) includes a section identifying the prior Administrative Orders on Consent and Consent Judgments (collectively “Consents”) entered into with various parties. More specifically, Section IV EPA’s Findings of Fact, paragraph numbers 15, 19, 23, 24, 25, 28, and 31. For each of the referenced Consents please advise as follows:

(a) Was a Covenant Not to Sue provided?

(b) Was the Covenant Not to Sue conditioned upon completion of actions required under the settlement so as to resolve liability?

(c) Was the Covenant Not to Sue immediately effective so as to immediately resolve liability?

(d) Have the required actions been completed?

(e) Have any of the Consents been terminated for non-compliance?

(f) Are the settlements reached with the parties to the Consents subject to the contribution protections provided in the pending settlement so as to bar those parties from bringing contribution actions against Harrison Supply under Section 113(f) for the monies expended in conjunction with the performance of the required actions in the Consents?

2. The Occidental Settlement Agreement provides an explicit agreement by Occidental to not assert any claims under Sections 107(a) or 113 of CERCLA that they may have for all matters related to OU2 against de micromis, de minimis and Ability-To-Pay Parties. Please advise as follows:

(a) Does the presently pending settlement offer to Harrison Supply and the other parties fall within the above provision?

(b) If not, can the Occidental Settlement Agreement be amended to provide the same?

(c) Will the EPA agree to include similar protections for Harrison Supply in any future settlements relating to OU2?

Thank you.

Very truly yours,

Timothy E. Corrison

TEC/mms